No. 86-640

In The

Supreme Court of the United States

October Term, 1986

GENEVA HARRIS, as Personal Representative of the Estate of Doretha a/k/a Dorothea Rolle, Deceased,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

On Petition For Writ of Certiorari From The Florida Third District Court of Appeal

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does the United States Constitution require each local government in the United States to adopt an administrative rule formally authorizing their police officers to abandon hot pursuit of fleeing felons when, in the officers' judgment, the continuation of pursuit would be unduly dangerous?

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OPINIONS BELOW

The opinions of the Florida District Court of Appeal, Third District (hereinafter "Third District"), are reported at 490 So.2d 69 and are contained in the Petitioner's appendix at pp. 1-37.

JURISDICTION

The opinions of the Third District were rendered April 1st and 9th and June 3rd, 1986. Petitioner then filed a second motion for rehearing which was denied without

opinion on July 14, 1986. The jurisdiction of this Court has been invoked by the Petitioner under 28 U.S.C. Section 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Section 1 of the Fourteenth Amendment to the United States Constitution:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Title 42, U.S.C. Section 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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STATEMENT OF THE CASE

Respondent cannot accept Petitioner's statement of the case and synopsis of the facts and offers the following statement instead.[1]

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[1] Citations will be presented as follows: Petitioner's Appendix ("Pet. App. —"); Respondent's Appendix ("Res. App. —"); Trial Transcript ("TT —"); Record on Appeal ("R —").

On April 27, 1980, Miami police officers attempted to apprehend a burglar named Rolle. Mr. Rolle fled through the City at high speed in a Cadillac and the police followed in hot pursuit. The police surrounded and momentarily captured Mr. Rolle but he escaped, braving police revolvers pointed at his head, by throwing his vehicle into reverse, jumping the curb, driving across private yards and nearly running over police officers on foot. Pursuit resumed and road blocks were devised but Mr. Rolle evaded capture by again driving across sidewalks and front yards. (R. 1-9; TT. 646-666, 173.) Eventually Mr. Rolle made an abrupt turn immediately in front of his pursuers and was struck by one of the police cars. Fish-tailing around a corner, Mr. Rolle lost control of his vehicle and, approximately a block and a half later, ran up on a sidewalk and over Mrs. Rolle (no relation to Mr. Rolle) who was seated on a bench. Mrs. Rolle was severely injured and later died. (TT. 147-237, 567-608, 623-642, 642-671, 800-820.)

Plaintiff, the victim's representative, filed suit against the City. Plaintiff did not sue Mr. Rolle or any of the police officers involved. Plaintiff's complaint (R. 1-9; Res. App. 1-9) was based on a common-law theory of "negligent failure to capture." Plaintiff alleged that the police had negligently allowed Mr. Rolle to evade capture by not taking more aggressive action *before* he ran over Mrs. Rolle.[2] Plaintiff also advanced a claim under 42

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[2] Plaintiff alleged that the police had negligently failed to take advantage of many prior opportunities to capture or disable Mr. Rolle, allegedly because the police department had a policy of avoiding damage to its police cars even at the risk of allowing a dangerous felon to escape capture. (Res. App. pp. 1 to 9.)

U.S.C. Sec. 1983. Plaintiff alleged that the City had deprived Mrs. Rolle of her "right to life without due process of law" by failing to train its police officers how to capture fleeing felons and/or by adopting a policy of avoiding damage to its vehicles even when it meant allowing criminals to evade or escape capture.

After Plaintiff presented her case at trial, the trial judge permitted Plaintiff to radically alter her federal claim against the City. (TT. 545, 843-844.) The trial court permitted Plaintiff to amend the complaint *ore tenus* to allege that the City had violated the United States Constitution by failing to have a regulation authorizing its officers to ***abandon*** pursuit whenever pursuit became unduly dangerous.[3] As later explained on appeal to the district court (Rolle's Answer Brief at pp. 36-37), Plaintiff's federal claim was that the City had violated Mrs. Rolle's rights by directing its officers to pursue fleeing felons and not formally authorizing them to use their discretion in *abandoning* pursuit whenever pursuit became unreasonably dangerous. Plaintiff thus accused the City of implicitly causing the police to pursue without regard to the danger they were creating.[4]

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[3] Plaintiff had originally claimed that the City had violated Mrs. Rolle's constitutional rights by inducing excessive forbearance by its officers; Plaintiff at trial was permitted to turn that claim on its head by alleging that the City had violated Mrs. Rolle's constitutional rights by inducing its officers to be excessively fierce in their effort to stop Mr. Rolle.

[4] As the Third District later phrased it, Mrs. Rolle's theory was that the City had mandated that its police pursue fleeing criminals until apprehension and *"failed to provide* for

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The trial court submitted both the common law *respondeat superior* claim and the (amended) federal claim to the jury. The jury was asked to decide *only* whether the City had negligently adopted "an inadequate policy in regard to police chases that was a legal cause of the death of Dorothea Rolle." (Res. App., pp. 10-11.) The jury decided that question in the affirmative, and judgment was entered accordingly. (R. 566-567.) The jury did not and was not asked to apportion liability or damages between the common-law negligence and Federal Constitutional claims, but the amount awarded far exceeded the City's maximum tort liability limits under state law.

The City appealed to the Florida Third District Court of Appeal. Mrs. Rolle defended her Federal recovery by asserting that the City, having instructed its police to pursue fleeing felons, should have had (but lacked) a countervailing "proviso" authorizing its police to suspend pursuit when in their judgment pursuit became unreasonably dangerous. Plaintiff argued on appeal that the *absence* of a "discretionary-abandonment" policy was a Constitutional violation.[5]

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the abandonment of the pursuit when in the judgment of the officer the continuation of the pursuit would involve a significant risk of injury or death. . . ." (Pet. App. 23-24; emphasis supplied.)

[5] As established at trial (TT. 386-387) in common with most other cities the City of Miami did have express regulations requiring the police to abandon pursuit in specific situations (e.g., whenever the police lost sight of the fleeing criminal and whenever environmental conditions made pursuit too hazardous), and also restricting pursuit in school zones, restricting the speed the police could use, requiring complete stops at all intersections, and requiring the

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The Third District initially affirmed the judgment against the City based on both on the common law and Section 1983 claims. The City moved for rehearing solely with respect to the Plaintiff's federal claim, arguing that the Federal Constitution did not require it to adopt a formal rule authorizing "discretionary abandonment" of hot pursuit. While the City's rehearing petition was pending, this Court decided *Pembaur* and *Daniels*.[6] The Third District granted the City's rehearing petition and retracted its original opinion, observing that the jury had *only* been asked to decide whether the City's hot pursuit policy was "inadequate," and that even if the City's policy *was* "inadequate" that only meant the City was negligent. The Third District noted that there was no evidence in the record showing that the "inadequacy" of the City's policy resulted from anything other than mere oversight by the City. The Court held that such evidence was not sufficient for recovery Under Section 1983. The Third District reaffirmed the common law tort judgment against the City but remanded the case for retrial of Plaintiff's federal claim so that Plaintiff could attempt to prove that the City's failure to adopt a more "adequate" abandonment-of-chase policy constituted a violation of the Plaintiff's federally-secured civil rights. Rather than re-try her federal claim, however, Plaintiff has sought review by the United States Supreme Court.

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use of lights and sirens at all times. Plaintiff's contention was that under the United States Constitution, those safeguards were "inadequate" without the additional safeguard of a formal regulation explicitly authorizing the police to use their own discretion in continuing or abandoning pursuit.

6 Pembaur v. Cincinnati, — U.S. —, 106 U.S. 1292, 89 L.Ed.2d 452 (1986); Daniels v. Williams, 474 U.S. —, 106 S.Ct. 662, 88 L.Ed. 662 (1986).

SUMMARY OF ARGUMENT

1. The Petition does not present a substantial question for consideration because the Petition and the underlying record are both too muddled to warrant review, the challenged opinion is not final, and Petitioner did not seek available review by the Florida Supreme Court.

2. The Petition does not present a substantial question for consideration because even if Mrs. Rolle was killed by a fleeing felon because police officers were too fierce in their pursuit, and even if the police were too fierce because they did not realize they had the discretion to abandon pursuit, and even if the police were ignorant of their right to abandon pursuit because the City failed to adopt a rule so stating, still the City's negligent failure to adopt such a rule of "discretionary abandonment" was not a deliberate policy decision and did not violate Mrs. Rolle's Constitutional rights.

ARGUMENT

I. THE COURT SHOULD NOT ACCEPT THIS CASE BECAUSE THE CHALLENGED OPINION DOES NOT CONSTITUTE A FINAL DECISION; THE QUESTION PRESENTED IS INSUBSTANTIAL; PETITIONER FAILED TO SEEK AVAILABLE REVIEW IN THE FLORIDA SUPREME COURT, AND THE PETITION VIOLATES THE SUPREME COURT RULES.

A. The Record And The Petition Are Too Confused To Warrant Review.

This Court's Rules emphatically require that petitions be lucid and to the point. Supreme Court Rules 21.1 and

21.5 provide that a sufficient basis for denying a petition is a petitioner's failure to state with brevity and clearness the essential points and issues presented for consideration by the Court. *This* petition is so prolix and muddled as to be almost unintelligible.[7]

Neither Respondent nor the Court should be forced to surmise the precise points and issues the Court is being asked to consider. The trial and appellate proceedings below were anything but a model of civil litigation. Both at trial and on appeal *critical* factual and theoretical issues were either overlooked altogether or addressed in cursory fashion. Section 1983 jurisprudence is already sufficiently perplexing to the Bar and the lower courts without this Court accepting for review a case founded on a muddled record and petition.

B. The Case Is Not Final.

The challenged opinion of the Third District does not conclude the controversy but was merely an intermediate step in the litigation. The challenged opinion affirmed the tort judgment against the City and remanded for further evidence on (i) damages, (ii) attorneys' fees, and (iii) Plaintiff's Section 1983 claim. Plaintiff has been given another opportunity to show that the City violated the

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[7] The Petition is also unreliable. The Petition at pages 12-13 asserts that the police chase was without supervision or coordination; that every police unit in half of the City was involved, and that the police were playing "dodgem." The Petition also asserts that a police car "rammed" and locked fenders with Mr. Rolle's vehicle and "forced him" to run over Mrs. Rolle. The Record citations do not, however, support those assertions. For example, the term "dodgem" was used by Petitioner's attorney, not the police, and the testimony concerning the precise cause and effect of the collision was disputed and not resolved by the jury's verdict

United States Constitution by having an inadequate policy governing police chases. As the case now stands, therefore, Plaintiff prevailed on her non-federal claim (though the question of damages on that claim has yet to be finally determined), and the Plaintiff's federal claim has been remanded for re-adjudication.

In *San Diego Gas and Electric Company v. City of San Diego,* 450 U.S. 651 (1980), a plaintiff's judgment for damages, based in part on a claim of an unjustified taking under the United States Constitution, was reversed by the state appellate courts, which remanded for a retrial, and this Court dismissed an appeal because in light of the retrial the state court's opinion did not result in a final judgment or decree.

None of the "finality" exceptions recognized by the Court in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), apply in this case. Petitioner is in effect urging this Court to intervene so that she is not required to try her federal claim, and given the Court's scarce resources the Court should not accept jurisdiction over a case merely to relieve a party of having to submit evidence in support of a federal claim. *See e.g., North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156 (1973).

In *Minnick v. California Department of Corrections,* 452 U.S. 105 (1981), the Court dismissed a certiorari petition which arose under similar circumstances. The petitioner in *Minnick* had challenged the constitutionality of a state program and obtained a favorable judgment in the trial court; the California Court of Appeals reversed (also due to an intervening Supreme Court decision) and

remanded for retrial because the evidence in the Record was insufficient to support a finding of unconstitutional behavior under the then-existing caselaw. This Court dismissed the Petition on the grounds that the retrial would have a significant effect on the federal constitutional issues, and that none of the exceptions to finality requirement under *Cox* were present. *See also Odell v. Espinoza,* 456 U.S. 430 (1982), a wrongful-death action arising from police misconduct, in which the Colorado Supreme Court remanded a case for trial and this Court held that the decision was consequently not final "as an effective determination of the litigation" pursuant to *Market Street R.Co. v. Railroad Commissioner of California,* 324 U.S. 548 (1945).

Similarly, in *Flynt v. Ohio,* 451 U.S. 619 (1981), the Court dismissed a petition for writ of certiorari for lack of jurisdiction where a state appellate court had remanded a case for retrial of a federal claim. The Court, quoting from *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945), commented that the final-judgment rule precludes reviewability ". . . where anything further remains to be determined by a state court, no matter how disassociated from the only federal issue that has finally been adjudicated by the highest court of the state." In the present case, the matter which remains to be determined on retrial is hardly "disassociated" from the federal issue; the matter to be decided on retrial *is the federal issue itself.*

In addition, even if the Third District's opinion *had* finally resolved the controversy (which it did not), its opinion would only be of precedential significance in two South Florida counties. The challenged opinion would not

even have precedential weight in the United States District Court for the Southern District of Florida. Respondent submits that such an opinion is not sufficiently important to warrant Supreme Court review.

C. Petitioner Could Have And Should Have Sought Review By The Florida Supreme Court.

In addition, Respondent submits that jurisdiction is lacking because Petitioner could have but did not seek review of the Third District's opinion in the Florida Supreme Court. Under 28 U.S.C. Section 1257, unless the Florida Supreme Court plainly did *not* have jurisdiction to review the Third District's decision, this Court would lack jurisdiction to do so. *Banks v. California*, 395 U.S. 708 (1969). Under the Florida Constition, however, the Florida Supreme Court has jurisdiction to review any district court opinion in direct and express conflict with any other district court opinion (or Florida Supreme Court opinion) on the same question of law, and also to review any district court decision which expressly construes a provision of the United States Constitution. *See* Article 5, Section 3(b), Fla.Const. (1968 Rev.). Petitioner did not seek review by the Florida Supreme Court on either ground. Petitioner claims that "conflict" jurisdiction was lacking, but does not even mention the Florida Supreme Court's jurisdiction under Section 3(b)(3).

Numerous recent Florida district Court opinions have expressly and directly construed Section 1983 and would have provided a plausible basis for Florida Supreme Court

"conflict" jurisdiction,[8] and the Third District's opinions did expressly construe the Due Process Clause of the Fourteenth Amendment. *See generally Ford Motors Co. v. Zikus,* 401 So.2d 1341 (Fla. 1981); *David v. State,* 369 So.2d 943 (Fla. 1979); *State v. Perez,* 372 So.2d 426 (Fla. 1979); *Potvin v. Keller,* 313 So.2d 703 (Fla. 1975); *City of Orlando v. Cameron,* 264 So.2d 421 (Fla. 1972); *Garcia v. Cedars of Lebanon Hospital,* 444 So.2d 538 (Fla. 3d DCA 1984).

Accordingly, this Court should not accept jurisdiction over this case because the Record is inadequate, the Petition muddled, the challenged opinions non-final, and because Petitioner could have but did not seek Florida Supreme Court review.

II. THE UNITED STATES CONSTITUTION DOES NOT PROTECT CITIZENS FROM BEING ACCIDENTLY RUN OVER BY GOVERNMENT EMPLOYEES WHO ARE DRIVING CARELESSLY, NOR DOES THE FEDERAL CONSTITUTION REQUIRE CITIES TO ADOPT FORMAL RULES GIVING THEIR POLICE DISCRETION TO ABANDON HOT PURSUIT.

Dorothea Rolle was run over by a car driven by a criminal who, while fleeing capture, collided with a pur-

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[8] *See, e.g.,* Lloyd v. Hines, 474 So.2d 376 (Fla. 1st DCA 1985) (discussing the liability under Section 1983 of a sheriff for negligence with respect to the supervision of employees); Higdon v. Metropolitan Dade County, 446 So.2d 203 (Fla 3d DCA 1984) (alleging county liability based on inadequate police protection); Penthouse, Inc. v. Saba, 399 So.2d 456 (Fla. 2d DCA 1981) (concerning the liability of government officials for failure to observe local laws or ordinances); Rankin v. Coleman, 476 So.2d 234 (Fla. 5th DCA 1985) (expressly discussing the liability of a sheriff based on a policy alleged to violate the Constitution).

suing police car and lost control of his vehicle. Plaintiff below never proved anything more than negligence by the police, and with respect to the City, Plaintiff only alleged that the City should have had but lacked a formal policy giving the police discretion to abandon pursuit. Accordingly, this case is merely a wrongful death case arising from careless driving by a City employee and negligent supervision by the City.[9]

Once Petitioner's hyperbole is strained away, the *very most* that the record reflects is that a City employee, in the course and scope of his employment, operated his motor vehicle carelessly and "caused" (or contributed to) the death of a bystander, and that the "cause" of the employee's negligence was his employer's failure to adopt a rule promoting careful driving. Petitioner thus advocates the following as a proper constitutional syllogism to govern this case:

1. Mrs. Rolle was killed by a fleeing criminal because a government employee was too aggressively trying to capture him.

2. The employee was too aggressive because the City did not tell him he did not have to be too aggressive.

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[9] Petitioner now characterizes the police conduct as "reckless," but the jury never rendered any such verdict and was not asked to do so, and the Third District's rehearing opinion characterized the police as negligent, not reckless. Moreover, since the police were not defendants, *their* mental state is irrelevant. The City was the Defendant and all Plaintiff proved with respect to the City was that its policy was "inadequate." In Rankin v. City of Wichita Falls, Texas, 762 F.2d 444 (5th Cir. 1985) the Court affirmed the dismissal of a Section 1983 complaint alleging negligence and commented that "Section 1983 liability depends on more than a failure to exercise the requisite duty of care."

3. The United States Constitution required the City to tell its employees they did not have to be too aggressive.

4. Ergo Mrs. Rolle was deprived by the City of her federal constitutional rights.

In point of fact, Petitioner's proof at trial proved both too much and too little. For purposes of holding the City employer liable under traditional *respondeat superior* doctrine Plaintiff proved too much because the City was liable for the officer's negligence *without* additional proof that the City was independently negligent for not supervising its employees. For purposes of holding the City liable under Section 1983, however, the evidence proved too little because proof of negligent supervision by the City was insufficient for purposes of holding the City liable under the Civil Rights Act. As this Court recently affirmed in *Daniels, supra:*

> "Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." *Daniels,* 106 S.Ct. at 665.

As the Court commented, the Constitution is intended to deal with the larger concerns of government and does not "purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Id.*

Petitioner asks this Court to rule that the City's failure to have an "adequate" policy governing hot pursuit was a *Constitutional* sin of omission. However, to convert this wrongful death case into a Constitutional

tort would mean that virtually every tort by a government employee would give rise to a constitutional claim against the government. A tort claim based on careless driving by a City employee—whether policeman or bus driver hardly matters in the context of this case—is as far removed from the concerns of the United States Constitution as any tort claim could be. In *Monell v. New York City Department of Social Services,* 436 U.S. 658, 691 (1978), the Court explained that municipal liability under Section 1983 is limited to deprivations of federally protected rights. In this case, Petitioner has *never* defined a federally-protected right imperiled by the City of Miami's "inadequate" policies governing hot pursuit. *See Ingraham v. Wright,* 430 U.S. 651 (1977). In *Paul v. Davis,* 424 U.S. 693, 698 (1976), this Court *specifically warned* against the very sort of expansion here advocated by Petitioner, proposing a "far-fetched"—but as it turns out, clairvoyant—hypothetical to make its point:

> "It would be difficult to see why the survivors of the innocent bystander . . . negligently killed by a sheriff driving a government vehicle would not have claims equally cognizable under Section 1983."

See also Parratt v. Taylor, 451 U.S. 527, 544 (1981), likewise warning against such an expansion of Section 1983 because if such an expansion were allowed then "any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under Section 1983." *See also Baker v. McCollan,* 443 U.S. 137 (1979); *Owen v. City of Independence,* 445 U.S. 622 (1980); and *Polk County v. Dodsun,* 102 S.Ct. 445 (1981).

The City's failure to adopt a formal rule explicitly confirming the discretionary authority of its police offi-

cers to abandon pursuit was, *at most,* a violation of a duty of care arising out of state tort principles, not a violation of the United States Constitution. The Due Process Clause does not extend to individuals a right to be free of injury whenever a government is characterized as a tortfeasor, for the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the states." *Davidson v. Cannon,* — U.S. —, 106 S.Ct. 668, 670-71 (1986); *Paul v. Davis,* 424 U.S. 693, 701 (1976); *Johnson v. Barker,* 799 F.2d 1396 (9th Cir. 1986).

Daniels and *Pembaur* were cited by the Third District as justification for retracting its original opinion, but actually the Section 1983 judgment against the City was incorrect for reasons predating those decisions. Under well-established federal precedent, it was not unconstitutional for the City to direct its police officers to apprehend fleeing felons—that after all is the *purpose* of having police—nor is the United States Constitution concerned with the City's negligent failure to formally remind its police that they are allowed to chase criminals "carefully". If as a result of the City's failure to direct its police to chase criminals carefully the police officers chased criminals carelessly and so "caused" the Petitioner's injury, then the City is liable as a matter of tort law but not federal constitutional law.[10]

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[10] No Federal Court has ever held that such a supervisory omission violates the United States Constitution. On the contrary, in *Richardson v. City of Indianapolis,* 658 F.2d 494 (7th Cir. 1981), a party was killed after a high-speed automobile chase and the Seventh Circuit held that the city could not be held liable based on a police failure to

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Petitioner has written a lengthy brief the primary purpose of which, it seems, is to show that the Third District did not understand this Court's decisions in *Daniels* and *Pembaur*, but Petitioner's Section 1983 recovery was unjustified even in the absence of *Pembaur* and *Daniels*. In *Baker v. McCollan*, 443 U.S. 137 (1979), this Court noted that although a government may be liable under tort principles,

> "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as '[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because a defendant is a state official."

Baker at 146.

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abandon the chase. The Circuit Court agreed with the district court's conclusion that pursuit of a criminal fleeing at high speed was proper and was indeed the legal obligation of the city and its police officers:

> "It was the duty of the defendant governmental units and agencies to instruct their employee defendant officers to pursue the decedent when he resorted to high-speed evasive flight to avoid arrest. . . ."

Id. at 499.

Therefore, even before *Pembaur* and *Daniels* were decided the City could not have been held liable under Section 1983 because liability can only arise for a violation of an established constitutional duty. Davis v. Scherer, 468 U.S. 183, 194 (1984). The City should never have been penalized for failing to predict what would have been an *unprecedented aberration* in the federal case law. Thorne v. City of El Segundo, 802 F.2d 1131 (9th Cir. 1986).

Just as medical malpractice and false imprisonment are not constitutional violations, so a wrongful death attributable to a government's supervisory negligence does not give rise to a Section 1983 claim, and that was true long before *Daniels* and *Pembaur* were decided. Petitioner can hardly complain that the Third District cited *Pembaur* and *Daniels* as the official reason for rescinding its initial opinion, since that rationale also justified the remand which gave Petitioner a right to retry her case. Had it not been for the Third District's reliance on *Pembaur* and *Daniels* (however unnecessary), the proper outcome would have been a remand for entry of final judgment in the City's favor.

Federal decisions arising from conceptually similar factual patterns, decided before *Pembaur* or *Daniels*, confirm that the Third District was right to reverse the Section 1983 judgment against the City, and that a reversal was proper even without the added authority of *Daniels* and *Pembaur*. For example, in *Major v. Benton*, 647 F.2d 110 (10th Cir. 1981), an individual died in a cave-in on a government supervised sewer project and his survivors alleged that the government was liable for *failure to formulate safety measures*, a claim conceptually indistinguishable from Petitioner's claim here. The Tenth Circuit affirmed summary judgment in favor of the government on the grounds that "a death resulting from the negligent action of a state official does not in itself raise a constitutional claim." *Id.* at 113. The Court, citing *Screws v. United States*, 325 U.S. 91 (1945), held that the Fourteenth Amendment does not extend to citizens the right "to be free from the torts of state officials. Instead, specific

constitutional guarantees must be implicated to give rise to due process protection." *Id.* at 113. *See also Martinez v. California,* 444 U.S. 277 (1980); *Wise v. Bravo,* 666 F.2d 1328, 1333 (10th Cir. 1981).

In *Oklahoma City v. Tuttle,* — U.S. —, 105 U.S. 2427, 85 L.Ed.2d 791 (1985), a police officer intentionally shot and killed the plaintiff's decedent when he refused to obey a police order to "freeze."[11] The Plaintiff in *Tuttle* sued the city on the theory that a city custom or policy caused the shooting, *based on its failure to properly supervise its police officers.* Petitioner's theory *sub judice*—that the City should have had but lacked a rule authorizing the abandonment of pursuit, is of course merely a specific variety of supervisory failure as generally alleged in *Tuttle.* As here, the plaintiff in *Tuttle* did not claim or prove that the City had a deliberate policy of authorizing misconduct by its officers. This Court noted, however, that the word "policy" implies a course of action consciously chosen from among various alternatives. In the present case there was absolutely no evidence presented that the City of Miami ever gave any consideration to the lack of or need for the additional policy which Plaintiff contended the City should have had, any more than there was proof in *Tuttle* that the policy-makers in Oklahoma City had deliberately chosen an inadequate training program.

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[11] As in Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1986), the death in *Tuttle* was intended by the police, while the death of Mrs. Rolle was the completely unintended and unforeseen result of an accidental collision with a fleeing felon.

In *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986), a high-speed chase by police resulted in a crash and severe injuries to a 13 year old driver. A Section 1983 action was brought against the government, and the Sixth Circuit affirmed summary judgment for the government defendant, holding that high-speed pursuit did not violate the Fourth or Fourteenth Amendments. The Court held that high-speed pursuit by police officers is not an unreasonable method of law enforcement and does not infringe the United States Constitution. Similarly, in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986), a police vehicle struck and killed the plaintiff and the Court held that there is no Section 1983 cause of action for injuries received in an automobile accident involving the negligence of city police:

> "The death occurred in an automobile accident, allegedly caused by the negligence of a police officer driving a city vehicle in the course of duties. No cases have been cited to this Court which held that automobile negligence by a state officer deprives an injured victim of due process of law."

Id. at 949.[12] The Eleventh Circuit in *Cannon* held that a person injured in an automobile accident caused by the negligent (or even grossly negligent) operation of a motor vehicle by a policeman acting in the line of duty has no Section 1983 cause of action for violation of a federal

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[12] Without suggesting that the collision in this case constituted the application of "deadly force," certainly not as to Mrs. Rolle, see Tennessee v. Garner, — U.S. —, 105 S.Ct. 1694, 1701 (1985): "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."

right. *Id.* at 950. The Court in *Cannon* also held that even if government officials had failed to control their police officers, such a failure did "not equate to an indifference to constitutional rights." *See also Reeves v. City of Jackson*, 608 F.2d 644, 652 (5th Cir. 1979); *Walton v. Salter*, 547 F.2d 824 (5th Cir. 1976) (pedestrian struck and killed by police car responding to call of armed robbery in progress; actions of officer who wantonly disregarded the safety of others do not give rise to a claim under Section 1983); *Ellsworth v. City of Racine*, 774 F.2d 182 (7th Cir. 1985); *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984); *Bowers v. De Vito*, 686 F.2d 616, 618 (7th Cir. 1982); *Maddox v. City of Los Angeles*, 792 F.2d 1408 (9th Cir. 1986) ("[N]egligent conduct by the state official is not enough to state a claim under Section 1983 based on alleged violations of the Fourteenth Amendment due process clause." *Id.* at 1413.)

In *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), a city and its police officers were sued because the police officers failed to assist a young couple trapped in a burning vehicle after an accident. The Court assumed that the complaint stated a proper claim under general tort principles, but held that it did not state a claim under Section 1983. The Court held that the plaintiff's claim could not succeed without evidence that the defendants had killed the plaintiff's decedent "in circumstances making the killing an intentional tort." As the Seventh Circuit commented: "Section 1983 is not a mandate of highway safety." *Id.* at 1205. *See also Rizzo v. Goode*, 423 U.S. 362 (1976) (for the proposition that a "general allegation of administrative negligence fails to state a constitutional

claim cognizable under Section 1983"); *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983) (confirming that Section 1983 liability of a government cannot be based on simple negligence by the policy-makers, but must at least be based on "gross indifference amounting to conscious indifference."); *Hull v. City of Duncanville*, 678 F.2d 582 (5th Cir. 1982); *Escamilla v. City of Santa Ana*, 796 F.2d 266 (9th Cir. 1986) (where the plaintiff's decedent sued a city and its police officers for failing to intervene sooner during a barroom brawl which led to the death of an innocent bystander, and the Ninth Circuit held that the Plaintiff could not show a deprivation of rights secured by the Constitution or other federal law).

As the Fifth Circuit remarked in *Williams v. Kelly*, 624 F.2d 695, 697 (5th Cir. 1980), for a Section 1983 claim to arise the government must commit "the sort of abuse of governmental power that is necessary to raise an ordinary tort by a government agent to the stature of a violation of the Constitution." A failure by government to police the community or its own employees may well be tortious, but it is not a *constitutional* tort which justifies prosecution under Section 1983 action. *Hull, supra* at 585.

This Court's decisions in *Pembaur* and *Daniels* were not revolutionary; they merely confirmed principles already expressed by this Court on many prior occasions. Accordingly, the Third District was right to have reversed the Section 1983 judgment against the City, because all Plaintiff proved at trial was that the City lacked an adequate "chase" policy. That reversal was mandated by this Court's decisions in *Daniels* and *Pembaur*, and it was mandated by Supreme Court and Circuit Court decisions

predating *Daniels* and *Pembaur*. The City's failure to have adequate rules governing hot pursuit may have been tortious but it was not unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be denied because the case is insubstantial and the Florida District Court correctly applied the legal principles established by this Court in rendering its decision. Jurisdiction is accordingly lacking.

Respectfully submitted,

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APPENDIX

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IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

CASE NO. 82-7845

MRS. GENEVA HARRIS, as Personal Representative of the Estate of DORETHA ROLLE, Deceased, Plaintiff, vs. THE CITY OF MIAMI, a municipal corporation; the CITY OF MIAMI POLICE DEPARTMENT, a city agency, and RONALD L. KUTCHER, Defendants.	COMPLAINT AT LAW AND DEMAND FOR JURY TRIAL

COMES NOW the Plaintiff, MRS. GENEVA HARRIS, as Personal Representative of the Estate of DORETHA ROLLE, Deceased, for the benefit of said Estate and the decedent's three minor children and sue and complain of the Defendants, the CITY OF MIAMI, a municipal corporation and the CITY OF MIAMI POLICE DEPARTMENT, a city agency, as follows:

1. This is an action for damages in excess of $10,000.00, exclusive of interest and costs, under the Florida Wrongful Death Statute, F.S. § 768.16, et seq.

2. This is also an action in accordance with Florida Statute § 768.28. The Plaintiff has complied with any and all requirements of said statute as to notice, etc.

3. Concomitantly and/or alternatively this action is brought pursuant to 42 U.S.C. Section 1983 and the Four-

teenth Amendment of the United States Constitution. Jurisdiction is founded upon 28 U.S.C., Section 1331 and Section 1343 and the aforementioned statutory and constitutional provisions.

4. The Plaintiff was and is a citizen of the United States, a resident of Dade County and the State of Florida; and the duly appointed Personal Representative of the Estate of her daughter, DORETHA ROLLE, Deceased.

5. At the time of her death on April 27, 1980 DORETHA ROLLE was sui juris, a citizen of the United States, and the State of Florida, and a resident of Dade County, Florida. At said time MRS. ROLLE was the natural mother of three children under the age of 18 years, i.e., AARON C. ROLLE, DERRICK S. ROLLE, and GLENDORA D ROLLE.

6. The Defendant, CITY OF MIAMI, at all times material hereto, was and is a municipal corporation within the State of Florida; the operator and director of an agency, known as "the CITY OF MIAMI POLICE DEPARTMENT," and the employer of any and all police officers to be later described in this Complaint.

6A. At all times material hereto, RONALD L. KUTCHER, was the owner of the motor vehicle being operated by TYRONE ROLLE, with the consent and permission of RONALD L. KUTCHER.

7. All of the police officers, to be later described in this Complaint, were, at all times material hereto, acting in the course and scope of their employment with the CITY OF MIAMI and the CITY OF MIAMI POLICE DEPARTMENT; and under color of law, to-wit: under the color of the statutes, ordinances, regulations, customs and usages

of the United States, and of the State of Florida, pursuant to their respective authority as police officers of the CITY OF MIAMI.

8. On or about April 27, 1980 at approximately 8:30 P.M., a police officer of Defendant, CITY, heard glass breaking at the Biscayne Shopping Center in the CITY OF MIAMI. A few minutes later, the officer in a patrol car then observed a white Cadillac, owned by RONALD L. KUTCHER and operated by TYRONE ROLLE, leaving the aforedescribed shopping center slowly with its lights out. It was the belief of said officer that TYRONE ROLLE had stolen several boxes of clothing from a J. C. Penny store.

9. Said officer then attempted to pull over the white Cadillac but failed.

10. A chase then ensued involving the white Cadillac and at least a dozen police cars and numerous police personnel from the CITY OF MIAMI and POLICE DEPARTMENT of said City.

11. At all times material hereto, the police aspects of said chase and attempted apprehension of TYRONE ROLLE, was completely under the direction and control of supervisory personnel of the CITY OF MIAMI and CITY OF MIAMI POLICE DEPARTMENT.

12. During the initial portion of the chase (as well as the entire portion of the chase) the white Cadillac (with the police vehicles in question in immediate pursuit) proceeded erratically up and down the streets, sidewalks, and highways of the CITY OF MIAMI at an extremely high rate of speed—through numerous red lights, stop signs, etc.;

making U-turns in front of police cars, running over the sidewalks, etc.

13. At all times material throughout the entire chase, it was known, understood and believed by the police officers involved in the chase, that if the chase continued in the manner to be described in this complaint, an innocent bystander was going to be hurt by the white Cadillac. Yet, despite the aforedescribed, the decision was made by the supervisory personnel and the police officers of the CITY OF MIAMI to continue the chase in the manner in which they did.

14. Approximately five (5) minutes after the chase commenced said police officers blocked the white Cadillac's route. When the white Cadillac's driver appeared to no want to stop for the blockade, the police officers removed the blockade for fear of incurring physical damage to their police vehicles.

15. Approximately 10 minutes after the chase commenced, the white Cadillac was forced to stop at the intersection of N.W. 75th Street and N.W. 17th Avenue due to traffic in front of said vehicle. The CITY OF MIAMI POLICE, then and there, completely surrounded said vehicle. Three of the officers then went up to the white Cadillac and with their heads inside or almost inside the white Cadillac's open window, told the driver to surrender. The driver, with the police officers screaming in his car, put the car in reverse aiming for another police car. Said police car then and there moved out of the way, (again for fear of damage to the police vehicle) allowing the white Cadillac to escape.

16. At no point, up until the driver put the white Cadillac in reverse, as described in paragraph 15, did the po-

lice *attempt to disable* the white Cadillac; or *use force to restrain* the driver of said vehicle; all of which was below the minimum standard of police procedure.

17. This "non-action" by the police as specified in paragraph 16 was done (a) despite the fact that the police knew an innocent bystander was going to be hurt; and (b) despite the fact that numerous opportunities were presented to the police to disable the white Cadillac and/or restrain its driver. It was done in large measure out of fear by the police and supervisory personnel of sustaining property damage to the police vehicles.

18. Subsequent to the escape of the white Cadillac as described in paragraph 15, the chase continued in the manner specified in paragraph 12 for at least another 15 minutes.

19. At approximately the intersection of N.W. 58th Street and N.W. 7th Avenue, the white Cadillac again went up on a sidewalk; this time striking a bus bench and DORETHEA ROLLE, who was seated on said bench. MRS. ROLLE was pinned under the white Cadillac. MRS. ROLLE was then dragged several blocks suffering severe burns and internal injuries. She died a few hours thereafter as a result of the burns and injuries.

I. CLAIM AGAINST THE CITY OF MIAMI AND THE CITY OF MIAMI POLICE DEPARTMENT FOR NEGLIGENCE IN ACCORDANCE WITH FLORIDA STATUTES § 76.28 et seq./ Respondeat Superior

The Plaintiff realleges and readopts padagraphs 1-19 of this Complaint and further states:

20. The police officers in question, as previously mentioned, were acting, at all times, in the course and scope

of their employment with the CITY OF MIAMI and CITY OF MIAMI POLICE DEPARTMENT.

21. The police officers in question had a duty to the public, and to the Plaintiff's decedent in particular, to exercise a reasonable degree of care for her safety under the circumstances as alleged in this Complaint.

22. The police officers in question breached said duty to the Plaintiff's decedent under the circumstances and were negligent in that they improperly, unreasonably, knowingly, and foreseeably exposed Plaintiff's decedent to the improper risk of harm under the circumstances by, among other things:

a) Negligently and carelessly, under the circumstances, conducting a chase specified in paragraphs 8-19 of this Complaint.

b) Negligently and carelessly, under the circumstances, conducting the chase in the manner as specified in paragraphs 8-19 of this Complaint.

c) Negligently and carelessly, under the circumstances, failing to disable or apprehend TYRONE ROLLE prior to his striking Plaintiff's decedent, or attempt same, all of which is specified in paragraphs 8-19 of this Complaint.

d) Negligently and carelessly, under the circumstances, failing to disable the vehicle driven by TYRONE ROLLE, or attempt same, prior to said vehicle striking the Plaintiff's decedent; all of which is specified in paragraphs 8-19 of this Complaint.

II. CLAIM AGAINST THE CITY OF MIAMI AND THE CITY OF MIAMI POLICE DEPARTMENT FOR DIRECT NEGLIGENCE IN ACCORDANCE WITH FLORIDA STATUTE § 76.28 et seq AND RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS IN ACCORDANCE WITH 42 U.S.C. SECTION 1938

The Plaintiff adopts and realleges paragraphs 1-19 of this Complaint and further states:

23. At all times material hereto the chase as described specifically in paragraphs 8-19 and 20-22 of this Complaint was directed, controlled, and supervised by managing agents, and managing officers of the Defendants.

24. At all times material hereto said managing agents and officers had a duty to Plaintiff's decedent to exercise a reasonable degree of care for her safety under the circumstances as alleged in this Complaint.

25. At all times material hereto said managing agents KNEW that if the chase continued, in the manner that it did, that an innocent bystander was going to get hurt.

25A. Yet, the CITY OF MIAMI and the CITY OF MIAMI POLICE DEPARTMENT had instituted a policy, which had been communicated to its police officers, to avoid property damage to its vehicles at almost all cost.

26. Said managing agents and managing officers knowingly and recklessly breached said duty to Plaintiff's decedent, under the circumstances, and were grossly negligent in that they knowingly exposed Plaintiff's decedent to an improper risk of harm under the circumstances by, among other things:

a) Conducting the chase, under the circumstances, as specified in paragraphs 8-19 of this Complaint, despite the known risk of harm to Plaintiff's decedent.

b) Conducting the chase in the manner, under the circumstances, as specified in paragraphs 8-19 of this Complaint, despite the known risk of harm to Plaintiff's decedent.

c) Failing to have attempted to disable or apprehend TYRONE ROLLE under the circumstances prior to his striking Plaintiff's decedent, as specified in paragraphs 8-19 of this Complaint, despite the known risk of harm to Plaintiff's decedent.

d) Failing to have attempted to disable TYRONE ROLLE's vehicle under the circumstances prior to said vehicle striking Plaintiff's decedent, as specified in paragraphs 8-19 of this Complaint, despite the known risk of harm to Plaintiff's decedent.

e) Failing to have adequately trained its police officers so that they might properly respond to the situation which presented itself to said police officers under the circumstances as specified in paragraphs 8-19; and more importantly, knowingly conducting the chase in the manner in which they did, with inadequately trained police officers, under the circumstances.

f) Placing the police officers directly involved in the chase, in a situation, where they were more concerned with city property damage, than the human life of a citizen of the City.

27. As a direct and proximate result of the negligent and reckless acts and omissions of the managing

agents and managing supervisors of the CITY OF MIAMI and CITY OF MIAMI POLICE DEPARTMENT as aforedescribed: a) Plaintiff's decedent was deprived of a right secured by the Constitution of the United States and: b) said deprivation was caused by persons acting under color of State law—i.e., the CITY OF MIAMI and CITY OF MIAMI POLICE DEPARTMENT violated, under the circumstancecs specified, Plaintiff's decedent's right to life without due process of law, as explicitly guaranteed by the Fourteenth Amendment.

III. CLAIM AGAINST RONALD L. KUTCHER

The Plaintiff realleges and adopts paragraphs 1-19 of this Complaint and further states:

28. Defendant, RONALD L. KUTCHER, as the owner of the white Cadillac in question is responsible to the Plaintiff for the negligent acts and negligent use of his vehicle as specified in this Complaint by his permissive driver, TYRONE ROLLE.

IV. COMPENSATORY DAMAGES

The Plaintiff readopts and realleges paragraphs 1-28 of this Complaint and further states:

29. As a direct and proximate result of the wrongful death of DORETHA ROLLE; and the actions and nonactions of the CITY OF MIAMI; CITY OF MIAMI POLICE DEPARTMENT, and RONALD L. KUTCHER in directly causing same; the following damages have been sustained:

A) AARON ROLLE AS A SURVIVOR AND MINOR CHILD OF HIS MOTHER, DORETHA ROLLE

1) The value of lost support and services; past, present and future;

2) The value of lost parental companionship, instruction and guidance; past, present and future;

3) Mental pain and suffering; past, present and future.

B) DERRICK S. ROLLE AS A SURVIVOR AND MINOR CHILD OF HIS MOTHER, DORETHA ROLLE

1) The value of lost support and services; past, present and future;

2) The value of lost parental companionship, instruction and guidance; past, present and future.

3) Mental pain and suffering; past, present and future.

C) GLENDORA D. ROLLE AS A SURVIVOR AND MINOR CHILD OF HER MOTHER, DORETHA ROLLE

1) The value of lost support and services; past, present and future;

2) The value of lost parental companionship, instruction and guidance; past, present and future;

3) Mental pain and suffering; past, present and future.

D) THE ESTATE OF DORETHA ROLLE, DECEASED

1) Medical and funeral expenses due to the decedent's death which have become a charge against the Estate or that were paid for or on behalf of the decedent.

2) Statutory attorney fees in accordance with 28 U.S.C. 1983.

IV. PUNITIVE DAMAGES AGAINST CITY OF MIAMI AND CITY OF MIAMI POLICE DEPARTMENT IN ACCORDANCE WITH 28 U.S.C. 1983 FOR RECKLESS CONDUCT AND GROSS NEGLIGENCE

The Plaintiff readopts and realleges paragraphs 1-27 of this Complaint and further states:

30. The reckless conduct and gross negligence of the CITY OF MIAMI and CITY OF MIAMI POLICE DEPARTMENT in accordance with 28 U.S.C. 1983 as specified in paragraph 8-27 of this Complaint are deserving of punitive damages on behalf of the Estate.

WHEREFORE, the Plaintiff sues the Defendants, jointly and severally, and request a jury trial on all issues triable of right by jury.

DATED: April 26, 1982.

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/s/ David L. Magidson

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 82-7845 (CA-30)

GENEVA HARRIS, as Personal Representative of the Estate of DORETHA ROLLE, Deceased, Plaintiffs, VS. CITY OF MIAMI, a municipal corporation, Defendant.	FINAL JUDGMENT IN FAVOR OF GENEVA HARRIS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DORETHA ROLLE, DECEASED, ON BEHALF OF SURVIVORS, DERRECK S. ROLLE, AARON ROLLE, GLENDORA D. ROLLE AND GENEVA HARRIS AND AGAINST THE CITY OF MIAMI, A MUNICIPAL CORPORATION.

(June 13, —)

This is a FINAL JUDGMENT in favor of GENEVA HARRIS, as Personal Representative of the Estate of DORETHA ROLLE, Deceased, on behalf of the survivors, DERRECK S. ROLLE, AARON ROLLE, GLENDORA D. ROLLE and GENEVA HARRIS and against the CITY OF MIAMI, a municipal corporation.

This cause was tried by and through a Jury Trial between May 29, 1984 and June 1, 1984. On June 1, 1984, this matter was submitted to a Jury and resulted in a verdict in favor of the Plaintiffs and against the Defendant, as follows:

WE, THE JURY, return the following verdict.

1. Did the City of Miami have an inadequate policy in regard to police chases that was a legal cause of the death of DORETHA ROLLE?

YES....X.... NO.....

2. Was there negligence on the part of the City of Miami which was a legal cause of the death of DORETHA ROLLE?

YES....X.... NO.....

If your answers to both of the above questions are "NO", then your verdict is for the Defendant and you should not proceed further except to date and sign this verdict form and return it to the Courtroom.

If your answer to either of the above questions is "YES", please answer question "3".

3. What is the total amount (100%) of any damages sustained by DERRECK S. ROLLE, AARON ROLLE, GLENDORA D. ROLLE and GENEVA HARRIS caused by the death of DORETHA ROLLE.

Total damages of:

DERRECK S. ROLLE	$165,000.
AARON ROLLE	$165,000.
GLENDORA D. ROLLE	$165,000.
GENEVA HARRIS	$100,000.

SO SAY WE ALL THIS 1 day of JUNE, 1984.

/s/ .....
FOREPERSON

Accordingly, in accordance with the foregoing, it is therefore:

1. ORDERED AND ADJUDGED that FINAL JUDGMENT be and it is hereby entered in this cause in

favor of the Plaintiffs and against the Defendant CITY OF MIAMI, in the sums of $165,000. for DERRECK S. ROLLE; $165,000. for AARON ROLLE; $165,000. for GLENDORA D. ROLLE; and $100,000 for GENEVA HARRIS, survivors, all lawful money of the United States of America, plus legal interest thereon from the date of this Judgment.

2. IT IS FURTHER ORDERED AND ADJUDGED that this Court shall retain jurisdiction of this cause for any and all post trial motions; for the determination of statutory attorney's fees; and for the determination of the taxation of costs by the Plaintiffs against the Defendant as per this Order.

DONE AND ORDERED at Miami, Dade County, Florida this 12 day of June, 1984.

MURRAY GOLDMAN
CIRCUIT COURT JUDGE

Conformed copies furnished to:

Donald Feldman, Esq.
Feldman & Levy, P.A.

David L. Magidson, Esq.
Abramson & Magidson, P.A.

Gisela Cardonne, Esq.